Filed 6/14/16 P. v. Romero CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. MIGUEL ANGEL LEON ROMERO, Defendant and Appellant.	E061921 (Super.Ct.No. RIF1303839) OPINION

APPEAL from the Superior Court of Riverside County. Christian F. Thierbach, Judge. Affirmed.

Tracy A. Rogers, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, A. Natasha Cortina and Kristen Kinnaird Chenelia, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found defendant and appellant Miguel Angel Leon Romero guilty of one count of lewd conduct on a child under the age of 14 with the use of force or fear (Pen. Code, § 288, subd. (b)(1)) and four counts of lewd conduct on a child under the age of 14 (Pen. Code, § 288, subd. (a)). The jury also found true that defendant committed the offenses against more than one victim (Pen. Code, § 667.61, subd. (e)(4)). As a result, defendant was sentenced to a total term of 75 years to life in state prison. On appeal, defendant argues that the trial court prejudicially erred in admitting evidence of prior uncharged sexual offenses he allegedly committed nearly 40 years earlier in Mexico. We reject defendant's contention and affirm the judgment.

I

FACTUAL BACKGROUND

Defendant is the grandfather of the victims: A.M., M.P., and A.P. Defendant molested his granddaughters when they were between the ages of five and 13 years old. The victims specifically recalled the following.

A. *A.M.* (*Jane Doe 1*; *Count 1*)

A.M., who was born in April 1998 and was 16 years old at the time of trial, testified that when she was 11 years old and starting the sixth grade, her maternal grandparents moved near her family home in Moreno Valley. They lived in an RV parked outside the family home until A.M. was 13 years old. A.M. recalled numerous incidents in which defendant sexually touched her. She noted that when she was 11 years old, defendant kissed her on the lips when no one else was around and told her not to tell

anyone about the incident. In another instance when she was still 11, defendant followed A.M. to the garage, grabbed her from behind, and put his hands down her pants onto her vagina for about a minute until she was able to pull away. A.M. stated that she was scared and did not say anything to her family about the incidents.

On another occasion, when she was 12 years old, she encountered defendant after using the bathroom. Defendant grabbed her waist, then put one hand down her pants touching her vagina over her underwear and the other hand down her shirt and grabbing her breasts under her bra. A.M. tried to pull away but defendant told her he was stronger than her. A.M. felt powerless and scared. The touching lasted about two minutes and stopped when her brothers came home. A.M. ran to her room and did not tell anyone about the incident.

In another incident, A.M. was in the living room alone with defendant when defendant grabbed her by the waist and put his hand down her pants. He then touched and rubbed her vagina over her underwear. Defendant stopped when her grandmother came to the front door. At another time, when she was still 12 years old, defendant picked A.M. up from school, parked at a liquor store, and kissed her on the lips, putting his tongue into her mouth. A.M. backed away and defendant said that he was teaching her for when she had a boyfriend.

After defendant moved away, defendant came to visit with the family, but no further incidents occurred. About a year or so later, A.M.'s mother asked her why she did not like to be touched. A.M. then disclosed the molestations. A.M. did not want to

disclose the molestations earlier because defendant was staying at the house and she was scared. She also did not want to tell her mother because defendant was her mother's father. A.M. did not want to tell her grandmother because she did not trust her. A.M. did not speak to her cousins, M.P. and A.P., about the molestations, even though she had a good relationship with them.

B. *M.P.* (*Jane Doe 2*; *Counts 2 through 4*)

M.P., who was born in September 1998 and was 15 years old at the time of trial, testified that the family was close and that defendant visited her family often while living in Moreno Valley. She recalled that she was five or six years old the first time defendant made her feel uncomfortable. Specifically, she stated defendant kissed her and touched her breasts, vagina and buttocks in a manner that made her feel uncomfortable. She recalled an incident where defendant touched her vagina for about a minute while the family was watching a movie together and defendant was sitting on the couch next to M.P. with a blanket over them.

She also noted that when she was in the fourth or fifth grade and about 10 or 11 years old, defendant frequently tried to kiss her on the mouth and to touch her on the breasts or buttocks. She recalled an incident in the backyard shed in which defendant grabbed her by the waist and touched her breasts over her clothing. She pulled away and yelled " 'No.' " Defendant told her to stop screaming, allowed her to leave, and told her not to tell her parents.

On four occasions defendant gave M.P. rides on his motorcycle. Defendant would drive the motorcycle around the corner and then stop and ask for a kiss. When M.P. refused, defendant would make sad faces and guilt her into letting him kiss her. He would sometimes use his tongue.

When M.P. was in elementary school, she recalled an incident where she was walking past the bathroom and defendant opened the bathroom door and pulled her inside. Defendant closed the door behind M.P. She didn't realize he was wearing a shirt and no bottoms until he told her to look at his penis and showed it to her. M.P. did not know what to think, opened the door and left.

In another incident, when M.P. was in the fifth grade, defendant grabbed M.P. from behind while swimming with defendant in the family pool. He then touched her breasts and put his hand inside her bathing suit and touched her buttocks. Around this same time, defendant pulled down M.P.'s pajama bottoms and underwear and took a picture of her vagina with a disposable camera. On another occasion, while alone with defendant inside his RV, defendant touched M.P.'s buttocks and breasts. M.P. also recalled an incident in which defendant grabbed and rubbed her breasts for about a minute over her shirt in a parking lot at a volleyball game when she was in the seventh grade.

M.P. did not disclose the molestations but did tell her sister, A.P., and her cousin, A.M., about defendant kissing her. She did not tell her mother because she did not think her mother would believe her since defendant was her mother's father. M.P. finally

disclosed the details of the molestations to her parents when she was 14 years old after her father asked her if defendant had ever touched her inappropriately.

C. *A.P.* (*Jane Doe 3*; *Count 5*)

A.P., who was born in May 1997 and was 17 years old at the time of trial, testified that M.P. was her sister and that defendant was her grandfather. She noted first feeling uncomfortable with defendant when she was about seven years old and defendant started kissing her on the lips, rather than the cheek. She recalled several incidents in which defendant kissed her on the lips for a couple seconds. The first incident occurred in the entryway of their home and the second incident after returning from the car carrying groceries. On another occasion, A.P. was returning to the house from the garage and defendant grabbed her shoulders and kissed her on the lips for about 10 seconds. She had seen other kids kiss their parents on the lips and wasn't sure it was wrong. A.P. also recalled an incident in which defendant kissed her on the lips and used his tongue until she pulled away.

When A.P. was eight or nine years old, defendant bribed A.P. with gum to get her to kiss him. And, when she did kiss him, defendant would use his tongue. A.P. thought the kissing was disgusting. She explained that defendant would show her some gum and say, " 'Will you kiss me for a stick of gum?' " After she nodded yes, defendant held her shoulders while kissing her. She also recalled defendant taking her for rides on his motorcycle and driving her to secluded areas to kiss her on her lips. This occurred about 10 times. She allowed defendant to kiss her because she was used to it.

A.P. did not disclose the incidents because she did not think anyone would believe her. She eventually disclosed the kissing incidents when she was 15 years old after her mother asked her if defendant had done anything inappropriate to her. A.P. stated that her sister, M.P., also reported that "something happened" to her. A.P. noted M.P. would lie about "small stuff" to her, but M.P. would not lie about "big things."

D. *Evidence of Prior Uncharged Acts against Defendant*

Maria D. and Ma.M. are sisters of defendant's wife, Elma Duran. The women live in Mexico and are 55 and 54 years old respectively. Both of the women were flown from Mexico by the district attorney's office and were staying with A.M.'s family. They learned of the allegations against defendant from A.M.'s mother, their niece.

Maria D., who is about 10 years younger than Duran, recalled that when she was 11 years old, defendant would reach under her pajamas while she was in bed and touch her stomach, breast, vagina, and legs. She also saw defendant touching her sister, L., who shared a bed with her, but could not see what his hand was doing. Maria D. did not tell her sister Duran what happened, and would shake with fear because sex was considered "dirty" and a forbidden subject not to be discussed. The touching occurred every time defendant spent the night on a monthly or bi-monthly basis. The last time defendant touched her, her older sister Cecilia woke up, hit defendant, and got him out of their room.

Ma.M. was four or five years old when defendant began touching her. She recalled an incident in which defendant told her that her pants were crooked and pulled

them down. He then touched her buttocks and pulled her pants back up. She did not know if this was normal. After that incident, defendant referred to her as "his little girlfriend." She related another incident when defendant patted her buttocks when she was four or five years old.

Ma.M. also recalled an incident when she was eight or nine years old while playing tag in the pool. During this incident, defendant touched her breasts, vagina, and buttocks, and said the touchings was accidental. Ma.M. also saw defendant touch her sisters Maria D. and P. the same way in the pool.

On one occasion, Ma.M. saw defendant on top of the family maid, who was 12 or 13 years old at the time and sleeping on the floor at the foot of her bed. Defendant was touching the maid under the covers. After Ma.M. woke up and asked defendant what he was doing, defendant said he was looking for blankets because he was cold. Ma.M. told defendant to look in the closet. Defendant then got up and noticed the maid was shaking and covering herself in fear. When Ma.M. was 11 years old, she caught defendant watching her through a window in the bathroom as she showered. She asked defendant what he was doing there, and defendant just laughed and got down.

Ma.M. never told her parents of defendant's behavior because her mother would not discuss anything of that nature. However, she told her sister Cecilia who then told their parents. When defendant and Duran came to visit, they no longer stayed overnight. Ma.M. did not talk to A.M., M.P., and A.P. about what happened to them and confirmed that she hated defendant for "all the things he has done."

E. *Defense*

Defendant denied molesting any of his granddaughters. He testified that he kissed A.M. on her cheeks and sometimes on the lips but never kissed her with his tongue. He kissed his children and grandchildren in the same manner when he greeted them. There were two incidents in the garage in which defendant tickled A.M., but did not touch her vagina, breast or buttocks. The second time he tickled A.M. she told him she did not like it, so he apologized and did not tickle her again. Defendant denied having any sexual thoughts when he tickled A.M.

Defendant also stated that the time he stopped at the liquor store, he had brought A.M. chocolate and when he gave it to her, she kissed him on the mouth. He denied giving her the chocolate to get her to kiss him. He also denied grabbing her in the bathroom, putting his hand down her pants or shirt, and grabbing her around the waist and pulling her to him. He also stated that he never "touched her private." He explained that he grabbed her wrist in the car when trying to take candy out of A.M.'s hand; that he caught her once when she tripped on the stairs; and that he never did anything with A.M. that he would not do in the presence of her parents. Defendant did not know why A.M. would say he put his hands down her pants and touched her inappropriately, and believed A.M. may have misinterpreted the tickling for some kind of sexual touching.

Defendant also denied using his tongue when kissing M.P. or touching her vagina or buttocks. He did not understand why M.P. would say such things but speculated that maybe it was because M.P. would get mad when people did not pay attention to her. He

also said that A.P. would call M.P. a liar. He recalled watching a movie and sitting under the blanket with M.P. but stated that he did not touch her. He also recalled M.P. bringing him water when he was working in the shed but denied grabbing her by the waist or touching her. He further confirmed that he took M.P. for rides on his motorcycle but denied kissing her during the rides. In regard to the exposure incident, defendant stated that he had just gotten out of the shower when M.P. entered the bathroom and saw him naked. He recalled taking pictures of A.P. and M.P. with a toy camera in their bathing suits after they asked him to do so because they were pretending to be models, but never naked.

Defendant further testified that he kissed A.P. on the lips in a grandfatherly way, but never with his tongue. He did not know why she would say he used his tongue when he kissed her. He believed that his granddaughters misinterpreted the innocent kissing on the lips and the incident with the camera.

Defendant also denied the allegations made by his sisters-in-law Maria D. and Ma.M., claiming both women were lying. He did not know why they hated him, but believed they resented him for marrying Duran and taking her to the United States.

Defendant's granddaughter C.V. testified on behalf of defendant. C.V., who was a high school student at the time of trial, testified that defendant never touched or spoke to her inappropriately. She also stated that she always felt safe and comfortable around defendant.

II

DISCUSSION

Defendant argues the trial court prejudicially erred in admitting evidence of prior uncharged sexual acts purportedly committed nearly 40 years earlier in Mexico against Maria D. and Ma.M. Specifically, he claims the trial court's inadequate consideration and analysis under Evidence Code[1] section 352 resulted in unduly prejudicial evidence that denied him his due process rights. He further asserts the standard of review is de novo and the error was not harmless beyond a reasonable doubt under *Chapman v. California* (1967) 386 U.S. 18 (*Chapman*).

The People initially respond defendant forfeited his constitutional claims of error because he only made a section 352 objection during trial. The People further argue that admission of section 1108 evidence is reviewed under the deferential abuse of discretion standard and that the trial court's application of section 352 did not exceed the bounds of reason in weighing the probative value of the uncharged sexual offenses against the potential for prejudice. In the alternative, the People maintain any error in admitting the uncharged sexual offenses was harmless under *People v. Watson* (1956) 46 Cal.2d 818 (*Watson*).

Preliminarily, as the People correctly point out, defendant forfeited his claim of federal constitutional error by failing to object in the trial court. (*People v. Pierce* (2002) 104 Cal.App.4th 893, 898 (*Pierce*) [defendant failed to preserve claims under

[1] All future statutory references are to the Evidence Code unless otherwise stated.

section 1108 by not raising them in the trial court]; *People v. Boyette* (2002) 29 Cal.4th 381, 424 [federal constitutional claims waived where defendant did not assert those specific grounds in the trial court]; *People v. Vichroy* (1999) 76 Cal.App.4th 92, 97 [rejecting the defendant's challenge to the court's admission of evidence under section 1108, the court observed: "[w]e reject his constitutional argument because no objection on that ground was raised below. 'It is "the general rule that questions relating to the admissibility of evidence will not be reviewed on appeal in the absence of a specific and timely objection in the trial court on the ground sought to be urged on appeal" ' "].)

In any event, for the reasons explained below, we reject defendant's claims on the merits.

A. *Legal Principles and Standard of Review*

During a criminal trial, evidence the defendant has committed a prior bad act is generally inadmissible to prove his conduct on a particular occasion, unless it is relevant to prove something other than his disposition to commit that act, such as motive or intent. (§ 1101, subds. (a), (b); *People v. Falsetta* (1999) 21 Cal.4th 903, 911 (*Falsetta*).) But as our Supreme Court explained in *Falsetta*, that rule does not apply in sex crime cases. With the passage of section 1108 in 1995, the Legislature determined evidence of a defendant's prior sexual misconduct may be used as propensity evidence in sex crime cases to prove he is disposed to commit such crimes and thus guilty of the charged offense. (*Falsetta*, *supra*, at pp. 911-912.)

By enacting section 1108 the Legislature intended, in the case of sex crimes, to sweep away the narrow categories of admissibility of other crimes evidence that had existed under section 1101. (*People v. Britt* (2002) 104 Cal.App.4th 500, 505 (*Britt*); *People v. Lewis* (2009) 46 Cal.4th 1255, 1286 (*Lewis*).) "[T]he Legislature's principal justification for adopting section 1108 was a practical one: By their very nature, sex crimes are usually committed in seclusion without third party witnesses or substantial corroborating evidence. The ensuing trial often presents conflicting versions of the event and requires the trier of fact to make difficult credibility determinations. Section 1108 provides the trier of fact in a sex offense case the opportunity to learn of the defendant's possible disposition to commit sex crimes. [Citation.]" (*Falsetta, supra,* 21 Cal.4th at p. 915.)

Section 1108, subdivision (a), provides: "In a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by Section 1101, if the evidence is not inadmissible pursuant to Section 352." There is nothing in the plain language of section 1108 that limits evidence of the defendant's sexual offenses to those committed against someone other than the victim in the case or those proved by witnesses other than the victim in the case.

"By removing the restriction on character evidence in section 1101, section 1108 now 'permit[s] the jury in sex offense . . . cases to consider evidence of prior offenses *for any relevant purpose*' [citation], subject only to the prejudicial effect versus probative

value weighing process required by section 352." (*Britt*, *supra*, 104 Cal.App.4th at p. 505.) Evidence of prior crimes is admissible, unless otherwise excluded by section 352, whenever it may be helpful to the jury on a common sense basis, for resolution of any issue in the case, including the probability or improbability that the defendant has been falsely accused. (*Britt*, *supra*, at p. 506.)

Before admitting such evidence, the trial court must determine whether it is barred by section 352. (§ 1108, subd. (a).) In sex crime cases, that section gives trial courts "broad discretion to exclude disposition evidence if its prejudicial effect, including the impact that learning about defendant's other sex offenses makes on the jury, outweighs its probative value." (*Falsetta*, *supra*, 21 Cal.4th at p. 919.) "Rather than admit or exclude every sex offense a defendant [has committed in the past], trial judges must consider such factors as its nature, relevance, and possible remoteness, the degree of certainty of its commission and the likelihood of confusing, misleading, or distracting the jurors from their main inquiry, its similarity to the charged offense, its likely prejudicial impact on the jurors, [and] the burden on the defendant in defending against the uncharged offense." (*Id*. at p. 917.) " 'The weighing process under section 352 depends upon the trial court's consideration of the unique facts and issues of each case, rather than upon the mechanical application of automatic rules.' [Citation.]" (*People v. Hollie* (2010) 180 Cal.App.4th 1262, 1274.)

The determination as to whether evidence rises to this level "is entrusted to the sound discretion of the trial judge who is in the best position to evaluate the evidence."

(*Falsetta*, *supra*, 21 Cal.4th at pp. 917-918.) As such, courts have consistently applied the abuse of discretion standard of review to a challenge to admission of prior sexual misconduct evidence under sections 1108 and 352. (*Falsetta*, *supra*, at p. 907; *People v. Avila* (2014) 59 Cal.4th 496, 515; *People v. Loy* (2011) 52 Cal.4th 46, 61; *People v. Fitch* (1997) 55 Cal.App.4th 172, 183 (*Fitch*); *People v. Branch* (2001) 91 Cal.App.4th 274, 282 (*Branch*); *People v. Dejourney* (2011) 192 Cal.App.4th 1091, 1104 (*Dejourney*); *People v. Miramontes* (2010) 189 Cal.App.4th 1085, 1098 (*Miramontes*).) We will not find an abuse of discretion in admitting evidence under section 1108 unless the court's ruling " ' "falls outside the bounds of reason" ' " and the court has exercised its discretion in an arbitrary, whimsical, capricious, or patently absurd manner that has resulted in a miscarriage of justice. (*Miramontes*, *supra*, at p. 1098; *Lewis*, *supra*, 46 Cal.4th at p. 1286; *Branch*, *supra*, at p. 282.)

Relying on *People v. Cromer* (2001) 24 Cal.4th 889 (*Cromer*), defendant argues that this court should review his claim de novo because it presents a mixed question of law and fact that implicates his federal constitutional rights to due process. Defendant's reliance on *Cromer* to support his position is misplaced.

Cromer established a de novo review to determine whether a prosecution's failed efforts to locate an absent witness are sufficient to justify an exception to the confrontation clause. (*Cromer*, *supra*, 24 Cal.4th at p. 901.) The application of this standard as set forth in *Cromer* is instructive. There, the California Supreme Court set forth a two-step analysis for applying the standard of review. First, the reviewing court

examines a trial court's findings of historical fact under a deferential substantial evidence standard if those facts are in dispute. (*Cromer*, *supra*, at pp. 900, 902.) *Cromer*'s definition of historical fact is derived from *Thompson v. Keohane* (1995) 516 U.S. 99, and *Townsend v. Sain* (1963) 372 U.S. 293, overruled on other grounds in *Keeney v. Tamayo-Reyes* (1992) 504 U.S. 1. Under these cases, deference is accorded to the trial court's findings of "what are termed basic, primary, or historical facts: facts 'in the sense of a recital of external events and the credibility of their narrators.' " (*Id*. at p. 310, fn. 6.) The reviewing court then applies "an objective, constitutionally based legal test to the historical facts" (*Cromer*, *supra*, at p. 900) as found by the trial court to independently review whether "the prosecution's failed efforts to locate an absent witness are sufficient to justify an exception to the defendant's constitutionally guaranteed right of confrontation at trial." (*Cromer*, *supra*, at p. 901.) Here, contrary to defendant's contention, the standard applied to the admission of evidence does not depend on "a mixed question of law or fact." Moreover, *Cromer* did not concern an evidentiary ruling and is inapplicable here.

Defendant also cites *People v. Duff* (2014) 58 Cal.4th 527 (Duff) to support his claim that de novo review applies to admission of evidence. Again, defendant's reliance on *Duff* is misplaced. *Duff* involved the admission of a confession under *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*). There, our Supreme Court explained: "In reviewing the trial court's denial of a suppression motion on *Miranda* and involuntariness grounds, ' " 'we accept the trial court's resolution of disputed facts and inferences, and its

evaluations of credibility, if supported by substantial evidence. We independently determine from the undisputed facts and the facts properly found by the trial court whether the challenged statement was illegally obtained.' " ' [Citations.] Where, as was the case here, an interview is recorded, the facts surrounding the admission or confession are undisputed and we may apply independent review." (*Duff, supra*, at p. 551.)

An analysis a trial court undertakes in admitting evidence under sections 1108 and 352 is not akin to an examination of admitting a confession under *Miranda*. Nor is the analysis similar to justify an exception under the confrontation clause. Defendant's attempts to portray these examinations as analogous are unpersuasive. Moreover, defendant cites no authority for the proposition that de novo review applies in the context of evidentiary rulings, nor are we aware of any such authority. In fact, appellate courts have consistently applied the abuse of discretion standard of review. The purpose of section 1108 is to allow relevant testimony of prior sexual misconduct for the purpose of resolving credibility contests in sexual misconduct cases where critical events are seldom witnessed. (*Falsetta, supra*, 21 Cal.4th at p. 915.) Defendant's arguments that de novo review applies for admission of evidence under sections 1108 and 352 is unpersuasive.

B. *Admission of Evidence*

Defendant argues that the trial court improperly weighed the factors to be considered and that it did not consider all relevant factors under section 352. We disagree.

Prior to the court's ruling, the People filed a motion requesting to introduce the prior uncharged sexual acts pursuant to section 1108. In the motion the People outlined the relevant law, and during the hearing the court stated it had read the motion. The court also held discussions about the admission of the evidence in chambers. The court made clear at the outset of its ruling that section 1108 evidence was constitutional and admissible if the trial court, in its discretion, found the probative value outweighed the prejudicial effect. The trial court understood its duties and the record demonstrates it correctly applied sections 1108 and 352. We reject defendant's claim that the trial court failed to conduct its analysis of the prior sexual misconduct evidence in a manner sufficient to satisfy due process.

The trial court gave consideration to the remoteness of the incidents, its similarity to the current charges, and its relevance. The court found the probative value of the evidence outweighed its potential prejudicial effect. Defendant also had ample opportunity during the trial to confront the witnesses and give his own version of the events. The testimony of the witnesses was relatively brief and not of a nature that would have led to the confusion of the jury.

Defendant argues that the prior sexual misconducts, which occurred approximately 40 years before the current sexual offenses, were too remote to have probative value and should have been excluded for this reason. We disagree. There are no specific time limits establishing when a prior offense is so remote as to be inadmissible (*Pierce*, *supra*, 104 Cal.App.4th at p. 900), and appellate courts have upheld the admission of prior offenses committed 20 to 30 years before the offenses at issue. (*People v. Spector* (2011) 194 Cal.App.4th 1335, 1388-1389 [prior gun assaults, including 28-year-old assault, properly admitted, particularly where similar assaults had recurred over a lengthy period of time]; *Branch*, *supra*, 91 Cal.App.4th at p. 284 [30-year-old sex offense properly admitted]; *Pierce*, at p. 900 [23-year-old rape conviction]; *People v. Soto* (1998) 64 Cal.App.4th 966, 977-978, 991-992 [21- to 30-year-old crimes]; *People v. Waples* (2000) 79 Cal.App.4th 1389, 1393, 1395 (*Waples*) [18- to 30-year-old offenses properly admitted].)

In *People v. Robertson* (2012) 208 Cal.App.4th 965, 970 (*Robertson*), the defendant was charged with kidnap for rape and related offenses. The evidence at trial showed that in 2009, the defendant lured his victim into a garage, locked it, and sexually assaulted her. (*Id*. at pp. 972-973.) The court admitted, under section 1108, evidence that approximately 34 years earlier, the defendant committed a rape and kidnapping. (*Robertson*, *supra*, at pp. 987-988, 992.) During that incident, the defendant picked up a hitchhiker, drove her to an isolated field, and raped her. (*Ibid*.) In affirming the admission of the earlier incident, the appellate court rejected a contention that it was too

remote, stating that " ' "substantial similarities between the prior and the charged offenses balance out the remoteness of the prior offenses." ' " (*Id*. at p. 992.) Applying that standard, the appellate court determined that the similarities between the earlier crimes and the charged offenses were sufficient to support the trial court's ruling. (*Id*. at pp. 992-994.)

We reach the same conclusion here. As the trial court noted, defendant's prior and current offenses are "very similar." In the uncharged sexual misconducts, like the charged offenses, defendant chose a victim who was a member of his family, under his care, and within the age range of five to 13 years old. The actual sexual conduct was also very similar in that defendant touched the girls' breasts, vagina, and buttocks. Further, in both the uncharged and charged offenses defendant's initial sexual touchings against each victim began in a manner which could appear innocent to the child. In view of those similarities, the trial court did not err in admitting evidence of the prior offenses.

Additionally, the uncharged prior offenses were no more inflammatory than the charged offenses. Indeed, defendant's current offenses involved more egregious conduct. Furthermore, it was not likely that the jury would have been confused or misled by the testimony of Maria D. and Ma.M. The prior crimes evidence was not extensive or time consuming. It consisted of two witnesses and their testimonies and is recorded in just 63 pages of transcript. They were subject to cross-examination and defendant had a reasonable opportunity to prepare a defense to their testimonies. Since defendant elected

to testify, he had an opportunity to tell the jury his version of the events surrounding his encounter with Maria D. and Ma.M.

We agree there was a risk the jury would be tempted to convict defendant of the current charges to assure he was punished for the prior uncharged offenses. (See *Branch*, *supra*, 91 Cal.App.4th at p. 284; *People v. Frazier* (2001) 89 Cal.App.4th 30, 42 (*Frazier*).) But the trial court gave the jury instructions that focused its attention on the current charges and advised it about the limited way in which it could consider the evidence of the uncharged offenses in relation to those charges. We conclude those instructions "counterbalanced" that risk. (*Frazier*, *supra*, at p. 42; see *Miramontes*, *supra*, 189 Cal.App.4th at p. 1103 [instructing jury on limited purpose of evidence of prior uncharged sex crimes reduced possibility of jury confusion].)

" ' "The 'prejudice' referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against defendant as an individual and which has very little effect on the issues. In applying section 352, 'prejudicial' is not synonymous with 'damaging.' " ' " (*Miramontes*, *supra*, 189 Cal.App.4th at p. 1098; see *People v. Karis* (1988) 46 Cal.3d 612, 638.) "The code speaks in terms of undue prejudice" (*Branch*, *supra*, 91Cal.App.4th at p. 286, italics omitted), and thus evidence should be excluded as unduly prejudicial " 'when it is of such nature as to inflame the emotions of the jury, motivating them to use the information, not to logically evaluate the point upon which it is relevant, but to reward or punish one side because of the jurors' emotional reaction.' " (*Ibid*.)

Here, we cannot say defendant sufficiently demonstrated that the evidence of the uncharged acts against Maria D. and Ma.M. would unduly prejudice him with the jury, or that the prejudice resulting would substantially outweigh the probative value of the evidence for purposes of section 1108. The acts are "extremely relevant" to his charged offenses (*People v. Van Winkle* (1999) 75 Cal.App.4th 133, 141), particularly where defendant tried to paint his granddaughters as mistaken or liars. (*Waples*, *supra*, 79 Cal.App.4th 1395 [propensity evidence highly relevant to dispute an attempt to paint current victims of sex offenses as liars or mistaken in their claims of molestation].) Since defendant flatly denied sexually molesting the victims in this case and there was no forensic evidence proving that the molestations occurred, evidence bearing on the respective credibility of defendant and the victims was highly probative. Testimony that defendant committed similar sexual misconducts on other young girls was relevant to prove common plan and to bolster the victims' credibility. It was also relevant to prove defendant's disposition to commit sexual offenses on young girls. Thus, we perceive no miscarriage of justice in the admission of the prior uncharged act evidence under section 1108 to prove defendant's propensity to commit the charged offenses. (*Dejourney*, *supra*, 192 Cal.App.4th at p. 1105.)

Relying on *People v. Tran* (2011) 51 Cal.4th 1040 (*Tran*), defendant argues that " 'evidence a defendant committed an offense on a separate occasion is inherently prejudicial.' " (*Tran, supra,* at p. 1047, italics omitted.) He also claims Tran "recognized the decreasing marginal value of cumulative evidence in the context of an analysis under

section 352." However, defendant's arguments regarding the cumulative nature of his prior misconducts and their prejudicial effect was largely rejected in *Tran*, *supra*, at p. 1046. In that case, the prosecution established a gang's predicate offenses, as required by Penal Code section 186.22, subdivision (f), by presenting evidence of crimes the defendant himself committed on behalf of the gang. On appeal, the defendant argued that in light of evidence of crimes committed by other gang members, evidence of his past crimes was cumulative and therefore unduly prejudicial. In rejecting this contention, the court stated: "[D]efendant cites no authority for the argument that the prosecution must forgo the use of relevant, persuasive evidence to prove an element of a crime because the element might also be established through other evidence. The prejudicial effect of evidence defendant committed a separate offense may, of course, outweigh its probative value if it is merely cumulative regarding an issue not reasonably subject to dispute. [Citations.] But the prosecution cannot be compelled to ' "present its case in the sanitized fashion suggested by the defense." ' [Citation.] When the evidence has probative value, and the potential for prejudice resulting from its admission is within tolerable limits, it is not unduly prejudicial and its admission is not an abuse of discretion." (*Tran*, *supra*, at pp. 1048-1049, italics omitted.)

In the present matter, the probative value of the prior uncharged offenses was not substantially outweighed by the probability that its admission would necessitate undue consumption of time, create a substantial danger of undue prejudice, of confusing the issues or misleading the jury. The trial court gave due consideration to the balancing test

under section 352 as required by section 1108 to admit the evidence of the prior uncharged offenses. Under the relevant standards, and viewing the evidence in the light most favorable to the trial court's ruling (see *People v. Carter* (2005) 36 Cal.4th 1114, 1148), we cannot conclude the court's decision to admit the testimony of Maria D. and Ma.M. as to defendant's prior acts was arbitrary, capricious, manifestly absurd, or exceeded the bounds of reason. (*People v. Mullens* (2004) 119 Cal.App.4th 648, 658.)

C. *Violation of Constitutional Rights*

Defendant asserts that admission of the prior uncharged sexual offenses evidence violates his constitutional rights to present a defense, due process, a fair trial, and fundamental fairness under the Fifth, Sixth and Fourteenth Amendments. We are not persuaded.

"[O]ur Supreme Court has held that Evidence Code section 1108 is constitutional on its face . . . ." (*People v. Manning* (2008) 165 Cal.App.4th 870, 877 (Manning).) It has withstood both due process and equal protection challenges. (*Falsetta*, *supra*, 21 Cal.4th at pp. 907, 916-922 [no due process violation]; *Fitch*, *supra*, 55 Cal.App.4th at pp. 182-184 [no equal protection violation].) The California Supreme Court "held that because of the protections written into Evidence Code section 1108, there was no undue unfairness in the statute's limited exception to the historical rule against the use of propensity evidence." (*Manning*, *supra*, at p. 878.) We are bound to follow the decisions of our Supreme Court. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

Defendant argues that because the trial court here failed to properly analyze, weigh and balance the factors under section 352, his constitutional rights were violated. We disagree. As previously noted, the record demonstrates the trial court properly analyzed the prior sexual misconduct evidence under section 352.

"Courts presume a statute is constitutional. . . . To show a violation of due process, a defendant must show that the statute, as applied, offended a principle of justice so rooted in the traditions and consciousness of the country that it is considered fundamental. [Citation.]" (*Manning, supra*, 165 Cal.App.4th at p. 877.) Defendant did not show that admission of the prior uncharged sexual misconduct evidence violated his due process or fair trial rights, as applied, by making the criminal trial fundamentally unfair. Accordingly, we reject defendant's constitutional challenges.

Defendant also claims that the passage of time and the fact the prior uncharged conduct took place in Mexico denied him his constitutional right to present a defense. In support, defendant reasons it was impossible for the defense to travel to Mexico and investigate the declarants' credibility and the merits of their claims. We find this claim unmeritorious. As previously noted, defendant had an ample opportunity to cross-examine Maria D. and Ma.M. and challenge their allegations in the closing argument. In addition, defendant testified in his defense and denied the uncharged offenses, claiming the witnesses held a grudge against him for marrying their sister and moving to the United States. The evidentiary ruling in this case did not result in any violation of defendant's constitutional right to present a defense. (See, e.g., *People v. Abilez* (2007)

41 Cal.4th 472, 503 [discretionary evidentiary ruling did not violate right to present a defense]; *People v. Gurule* (2002) 28 Cal.4th 557, 620 [ordinary rules of evidence generally do not infringe on the right to present a defense; rejecting argument that restricted cross-examination violated rights to confrontation, due process, and a fair trial]; *People v. Cunningham* (2001) 25 Cal.4th 926, 999 [exclusion of defense evidence on a subsidiary point is not a deprivation of due process]).

D. *Harmless Error*

Even if we assume, for the sake of argument, the trial court erred in admitting the uncharged prior acts involving Maria D. and Ma.M., such error was harmless in light of the evidence supporting defendant's convictions.

The erroneous admission of evidence under section 352 is reviewed under *Watson*, *supra*, 46 Cal.2d 818, which asks the question whether the error was harmless. In determining whether it was, we ask whether "it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." (*Id*. at p. 836.) A reasonable probability "does not mean more likely than not, but merely a reasonable chance, more than an abstract possibility." (*College Hospital Inc. v. Superior Court* (1994) 8 Cal.4th 704, 715, italics omitted.) A "reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Strickland v. Washington* (1984) 466 U.S. 668, 694.)

If we were to conclude that the admission of the uncharged prior acts evidence violated defendant's constitutional rights, our analysis of prejudice would be federal

harmless error analysis under *Chapman*, *supra*, 386 U.S. 18. (*People v. Geier* (2007) 41 Cal.4th 555, 608 (*Geier*).) "Since *Chapman*, we have repeatedly reaffirmed the principle that an otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt." (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 681.) The harmless error inquiry asks: " 'Is it clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error?' (*Neder v. United States* (1999) 527 U.S. 1, 18.)" (*Geier*, *supra*, at p. 608.) As our Supreme Court explained in *People v. Neal* (2003) 31 Cal.4th 63 (*Neal*), this means we must " 'find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record.' [Citation.] Thus, the focus is what the jury actually decided and whether the error might have tainted its decision. That is to say, the issue is 'whether the . . . verdict actually rendered in this trial was surely unattributable to the error.' (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279 . . . .)" (*Neal*, *supra*, at p. 86.)

Whether under *Watson* or *Chapman* (assuming for this discussion we had found constitutional error), the error was harmless because the remaining evidence against defendant was overwhelming. Three victims testified recounting defendant's conduct. Their testimony concerning defendant's conduct was similar in nature. Furthermore, defendant's testimony corroborated the incidents his granddaughters testified to; he, however, provided an excuse for his conduct or claimed the scenario was different than

claimed by the victims. Moreover, defendant had the opportunity to cross-examine the victims and argue they were not credible witnesses. Thus, any error was harmless.

III

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RAMIREZ
P. J.

We concur:

HOLLENHORST
J.

McKINSTER
J.